

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE)	
FOR BENEFICIAL APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE)	FOR
41I-100251-00 BY DAY SPRING)	DECISION
LAND COMPANY)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on June 15, 1998, in Helena, Montana, to determine whether a beneficial water use permit should be issued to Day Spring Land Company (Applicant) for the above application under the criteria set forth in Mont. Code Ann. § 85-2-311 (1) and (5) (1997).

APPEARANCES

Applicant appeared at the hearing by and through counsel, David Pengelly. Kenneth Diehl, one of the owners of Day Spring Land Company; David Schmidt, Hydrogeologist with Water Right Solutions; and David Baldwin, Hydrogeologist with Integrated Geoscience, Inc., appeared at the hearing as witnesses for Applicant.

Objector Melvin Hamilton appeared at the hearing in person and by and through counsel, Holly Jo Franz. Mark Cunnane, Professional Engineer and Hydrogeologist with Western Groundwater Services, appeared at the hearing as a witness for Objector Hamilton.

Objectors John Ulberg, Diane O'Brien, and Larry Hornby appeared at the hearing in person.

Jim Beck, Civil Engineering Specialist with the Helena Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), appeared at the hearing and was called to testify by Objector Hamilton.

The Montana Power Company withdrew its objection and is no longer a party to this proceeding.

Interlocutory Order
Application 41I-100252 by Day Spring Land Co.

Page 1

CASE # 100251

Objectors Naomi Skufca, Rich Cunrod and Susan Shephard, William and Anna Wright, and Robert J. Anez did not appear at the hearing nor had any of these objectors contacted the Hearing Examiner prior to the hearing; therefore, in accordance with Mont. Admin. R. 36.12.208 (1997), these objectors are in default and do not have status as parties in this matter.

EXHIBITS

Applicant offered seven exhibits for the record. All were accepted without objection.

Applicant's Exhibit A is a topographical map enhanced to show the location of Applicant's wells and the locations of all Objectors' wells. This map has the unnamed tributary drainage basin outlined in purple, the Helena Valley Canal route is enhanced with heavy black line. Spokane Creek location is enhanced with a thinner black line.

Applicant's Exhibit B consists of five pages and is the Vita of David M. Schmidt.

Applicant's Exhibit C is three pages of graphs showing the configuration of the cross sections where Mr. Schmidt measured the stream flow of the unnamed tributary and calculations of stream flow. This exhibit was amended by a Notice of Clarification of Hearing Exhibit submitted by Applicant and received by the Department on June 25, 1998.

Applicant's Exhibit D is a stratigraphic diagram showing the lithology of Applicant's wells in comparison with Objectors' wells. The top of the blue area indicates the static water level and the bottom represents the top of a clay layer.

Applicant's Exhibit E is also a stratigraphic diagram based on Exhibit D. It represents Applicant's wells in relation to the O'Brien well. It also represents a cross section of Spokane Creek and Helena Valley Canal.

Applicant's Exhibit F is the Professional Resume' of David O. Baldwin.

Applicant's Exhibit G is an eight-page document entitled *Day Spring Land Company, Well Analysis Project* prepared by Integrated Geoscience, Inc.

Objector Hamilton offered 14 exhibits for the record. All were received without objection.

Objector Hamilton's Exhibit 1 consists of nine pages is a photocopy of Statement of Claim 41I-W001925 and supporting documents filed by Melvin D. and Agnes A. Hamilton for an existing irrigation right.

Objector Hamilton's Exhibit 2 is a photocopy of Certificate of Water Right 41G-C009055 issued by the Department to Melvin D. Hamilton for domestic use on August 25, 1976.

Objector Hamilton's Exhibit 3 is a two-page letter dated April 16, 1978, to the Director of the Department of Natural Resources and Conservation regarding a well drilled by Applicant.

Objector Hamilton's Exhibit 4 is a two-page complaint filed by Melvin Hamilton on August 12, 1997, against Permit No. 41I-P010483 issued to Applicant.

Objector Hamilton's Exhibits 5 through 11 is a series of 11 by 14 inch photographs taken from an airplane by Objector Hamilton. The photographs begin at Ken Diehl's farmstead and continue downstream to Objector Hamilton's farmstead.

Objector Hamilton's Exhibit 12 is a 15-page report from William Uthman, Hydrogeologist to Jim Beck, Civil Engineering Specialist, concerning Application for Permit 41I-077547 by Ken Diehl.

Objector Hamilton's Exhibit 13 consists of four pages and is the Curriculum Vitae of Mark Cunnane, P.E.

Objector Hamilton's Exhibit 14 is a three-page letter to Ms. Holly Jo Franz from Mark Cunnane, owner of Western Groundwater Services.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. An application for beneficial water use permit in the name of Day Spring Land Company and signed by Kenneth Deihl was filed with the Department on February 12, 1997, at 11:12 a.m. (Department file.)

Interlocutory Order
Application 41I-100252 by Day Spring Land Co.

Page 3

CASE # 100251

2. Pertinent portions of the application were published in the *Independent Record*, a newspaper of general circulation in the area of the source, on July 16, 1997. Additionally, the Department served notice on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. Nine timely objections were received by the Department. Applicant was notified of the objections by a letter from the Department dated August 29, 1997. (Department file.)

3. Applicant proposes to appropriate 885.00 gallons per minute up to 327 acre-feet of groundwater at points in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 22, Township 10 North, Range 02 West, Lewis and Clark County, Montana, by means of two wells. The proposed use is irrigation on 131.00 acres in the SE $\frac{1}{4}$ of said Section 22 by means of a center pivot irrigation system. The proposed period of use is from April 1 through October 31, inclusive of each year. The new well produces 225 gallons per minute. The existing well produces approximately 500 gallons per minute.¹ The well in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 22 is permitted under 41I-P010483. The proposed well and existing well would be joined in a manifold system. There would be a shut-off valve between the two wells so each well could be operated independently. However, it is the intent of Applicant to irrigate the proposed acreage in the SE $\frac{1}{4}$ of said Section 22 with both wells.² (Department file and testimony of David Schmidt and Kenneth Diehl.)

4. The proposed use of water, irrigation, is a beneficial water use. Mont. Code Ann. § 85-2-102(2)(a) (1997).

5. Applicant has provided a preponderance of evidence it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

¹ The well drilled in 1978 originally produced 250 gallons per minute. Applicant had it rescreened and it now produces 500 gallons per minute. Applicant intends to rework the new well to increase the flow rate produced.

² The acreage under 41I-P010483 will not be irrigated with the new well.

CASE # 100251

Applicant owns the property where the water will be put to beneficial use.
(Department file and testimony of Ken Diehl.)

6. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.
(Department file.)

Objector Ulberg did mention water quality in his objection; however, he did not submit substantial credible information establishing to the satisfaction of the Department the criteria in subsection (1)(f), (g) or (h), as applicable may not be met. (Department file.)

7. Applicant provided a preponderance of evidence the objectors across Spokane Creek will not be adversely affected. The wells located on the east side of Spokane Creek are not diverting water from the same system as Applicant's wells. Groundwater flows to these objectors move down-gradient from the Spokane Hills. (Department files, Applicant's Exhibits A, D, and F, and testimony of David Schmidt and David Baldwin.)

8. There are questions whether Applicant has proven by a preponderance of evidence water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate and water can reasonably be considered legally available, in the amount requested, during the period Applicant seeks to appropriate; whether there is a preponderance of evidence the proposed project will not adversely affect the water rights of prior appropriators under an existing right; or whether the proposed means of diversion is adequate to produce the proposed flow rate.

The new well was completed on August 8, 1995, at a depth of 300 feet. It was pumped at its maximum capacity of 260 gallons per minute for 24 hours while four wells were monitored. Day Spring #1 irrigation well (DS1) at 2490 feet from the new well, Day Spring #2 irrigation well (DS2) at 2470 feet, Day Spring #3 irrigation well at 2785 feet, and R. Diehl well located 2895 feet. There was no measurable drawdown in any of the monitored wells. The test shows groundwater is physically available when the new well is pumped at 260

gallons per minute and most likely would be physically available at the proposed higher rate of 385 or 400 gallons per minute. However, the unnamed tributary which is the source of supply for Objector Hamilton was not monitored. It is not known whether the surface water in this stream is closely connected with the groundwater Applicant proposes to appropriate. There are memoranda from Department hydrogeologists which indicate there is a potential for impacts to surface water availability. The test was performed on the new well. Since the proposal is to use both the new and existing well to produce a flow rate of 885 gallons per minute, both wells should have been pumped.

During the processing of this application, the processor wrote on the "Criteria Assessment Review" form, "The well was tested and produced 225 gallons per minute. They are going to continue to work with the well for additional gallons per minute." Concerning the existing well, she wrote, "This well was originally tested at 250 gallons per minute but was rescreened and retested in 1996 and now produces 500 gallons per minute." Perhaps the new well can be reworked to produce the proposed gallons per minute, but there is not a preponderance of evidence to prove it can. In fact, there was nothing brought forward at the hearing from any party to address this subject.

Mr. Schmidt, in preparing the application wrote in the Criteria Addendum section concerning the new well, "The well was pump-tested for 9 hours and produced 225 gpm." Concerning the old well, "The well was pump-tested for 4 hours and produced 250 gpm." There was no mention of well improvement, old or new, yet the requested flow rate is 885 gallons per minute.

At this stage, the Department has two choices. It can deny the permit or it can issue an interim permit. If it denies the permit, Applicant will reapply and the objectors would be required to file objections and pay the filing fee again. If it grants an interim permit requiring certain tests and monitoring to be performed, Applicant most likely could provide a preponderance of evidence to prove all the criteria for issuance of a permit

and the permit would be granted. If, however, Applicant is not able to provide the preponderance of evidence, the permit would be denied.

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1997).

2. Applicant has met the criteria for issuance of a permit with the exception of water availability, adverse effect, and adequate means of diversion. There is substantial information in the Department file and submitted as exhibits which indicates these criteria can be met. The questions concerning these criteria can only be answered by performing a test and a monitoring program for one year.

3. The Department has the authority to issue an interim permit, pending final approval or denial of an application for a provisional permit, provided there is not substantial information available to the Department to show the criteria for issuance of a permit cannot be met. The interim permit may be issued subject to any terms and conditions the department considers necessary to protect the rights of prior appropriators. Mont. Admin. R. 36.12.104 (1997).

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law and upon the record in this matter, the Hearing Examiner makes to following:

INTERLOCUTORY ORDER

Subject to the terms, conditions, restrictions, and limitations listed below and upon receipt of the \$25.00 filing fee an Interim Permit 41I-I100251 is granted to Day Spring Land Company for Application for Beneficial Water Use Permit 41I-100251. Failure to submit the filing fee within 15 days after the service date of this Order will cause the application to be denied.

Interim Permit 41I-I100251 allows Day Spring Land Company to appropriate 885.00 gallons per minute up to 327 acre-feet of groundwater at points in the

Interlocutory Order
Application 41I-100252 by Day Spring Land Co.

Page 7

CASE # 100251

SW¼NE¼SE¼ and the NE¼SE¼NE¼ of Section 22, Township 10 North, Range 02 West, Lewis and Clark County, Montana, by means of two wells. The permitted use is irrigation on 131.00 acres in the SE¼ of said Section 22 by means of a center pivot irrigation system. The permitted period of use is from April 1 through October 31, inclusive of each year.

A. ** WATER MEASUREMENT RECORDS REQUIRED:

The appropriator shall install a Department approved water use measuring device at a point designated by the Department to allow the flow rate and volume of water diverted to be recorded. Water must not be diverted until the required measuring device is in place and operating. On a form provided by the Department, the appropriator shall keep a written weekly, except hourly during any aquifer or stream leakage testing, record of the flow rate and volume of all water diverted including the period of time, and shall submit the records by November 30 of each year and upon request at other times during the year. Failure to submit records may be cause for revocation or modification of a permit or change. The records must be submitted to the Water Resources Regional Office. Contact the regional office listed below to obtain their current address.

HELENA PH: 406-449-0944 FAX: 406-442-9315

The appropriator shall maintain the measuring device so it always operates properly and measures flow rate accurately.

B. ** TESTING PROGRAM

Applicant shall submit a testing program to the Helena Water Resources Regional Office for approval within 30 days after the service date of this Order. The new well shall be reworked until it produces at least 385 gallons per minute³ before the testing is begun. The testing program must include:

1. ** WATER MEASURING DEVICES

³ If the new well can't be made to produce 385 gallons per minute, another well may need to be drilled before the test. The objective is to test at the full rate of 885 gallons per minute.

Three measuring devices (standard weirs or flumes) shall be installed on the unnamed tributary to Spokane Creek which flows in an easterly direction near the wells which are the subject of this permit. A piezometer, between 5 and 10 feet long, shall be installed in the stream alluvium, but not in the stream channel, no more than 30 feet from each measuring device.

2. **TESTING

After being unused for at least 48 hours, the irrigation pumps shall be operated continuously for at least 24 hours. For three days prior to the test, the measuring devices and piezometers shall be measured every 12 hours. All measuring devices and piezometers shall be measured at the beginning of the test and every 15 minutes for the first two hours.

For the remainder of the test, the measuring devices and piezometer shall be measured every hour. The discharge from the wells shall be noted every hour.

3. **DATA RECORDS AND ANALYSIS

The data gathered shall be summarized in a form showing the date and time of the readings, the raw measurement, and the resulting flow rate or water elevation. A report shall be made summarizing the findings and providing a quantification of the impacts of pumping on the unnamed tributary to Spokane Creek. The data summary and report shall be made available to the hearing examiner and all parties within 60 days of the completion of the testing. The parties may file written comments to the Department within 30 days of the date of service of the report.

C. ** GROUNDWATER WASTE AND CONTAMINATION -- ACCESS PORT:

This right is subject to section 85-2-505, MCA, requiring all wells be constructed so they will not allow water to be wasted or contaminate other water supplies or sources, and all flowing wells shall be capped or equipped so the flow of the water may be stopped when not being put to beneficial use.

The final completion of the well(s) must include an access port of at least .50 inch so the static level of the well may be accurately measured.

D. ** INTERIM PERMIT NOT ENTITLEMENT TO PROVISIONAL PERMIT

The issuance of an interim permit does not entitle an applicant to a provisional permit, and approval of the application for a provisional permit is subject to the procedures and criteria set out in the Water Use Act.

E. ** DOES NOT OBTAIN ANY VESTED RIGHT

A person may not obtain any vested right to an appropriation obtained under an interim permit by virtue of the construction of diversion works, purchase of equipment to apply water, planting of crops, or other action where the provisional permit is denied or is modified from the terms of the interim permit.

F. ** EXPIRATION DATE

The interim permit shall expire on October 31, 1999.

After presentation of the evidence and timely comments by the parties to this proceeding, the Hearing Examiner will prepare a Proposal for Decision to which all parties will have an opportunity to present exceptions and request further oral argument before a final decision is made.

Dated this _____ day of September, 1998.

S/VL
Vivian A. Lighthizer
Hearing Examiner
Water Resources Division
Department of Natural Resources and
Conservation
P.O. Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Interlocutory Order was served upon all parties listed below on this ____ day of September, 1998.

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